(3)

Supreme Court, DC.
FILED
JUL 26 2002
OFFICE OF THE CLERK

No. 01-1328

IN THE

# Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE,

*Petitioner,*

v.

CHARLOTTE J. PRITT,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

THOMAS J. JOSEFIAK
*Chief Counsel*
CHARLES R. SPIES
*Deputy Counsel*
REPUBLICAN NATIONAL COMMITTEE
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8638

*Of Counsel*

BOBBY R. BURCHFIELD
*Counsel of Record*
JASON A. LEVINE
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

*Attorneys for Petitioner*

1499

## TABLE OF CONTENTS

**Page**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

ARGUMENT ..... 3

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION BELOW ..... 3

II. THE DECISION BELOW CONTRAVENES SETTLED FIRST AMENDMENT LAW ..... 5

III. THE *SPROUSE* CASE CONFIRMS MS. PRITT'S FAILURE TO ADDUCE EVIDENCE OF ACTUAL MALICE ..... 8

CONCLUSION ..... 10

## TABLE OF AUTHORITIES

**CASES**

**Page**

*ASARCO, Inc. v. Kadish,*
490 U.S. 605 (1989) ..... 3

*Anderson v. Liberty Lobby, Inc.,*
477 U.S. 242 (1986) ..... 2, 5

*Bose Corp. v. Consumers Union of the U.S., Inc.,*
466 U.S. 485 (1984) ..... 2

*Buckley v. Valeo,*
424 U.S. 1 (1976) ..... 3

*Cox Broadcasting Corp. v. Cohn,*
420 U.S. 469 (1975) ..... 3, 4

*Federal Elec. Comm'n v. National Conservative Pol. Action Comm.,*
470 U.S. 480 (1985) ..... 1, 2

*Fort Wayne Books v. Indiana,*
489 U.S. 46 (1989) ..... 4

*Harte-Hanks Communications, Inc. v. Connaughton,*
491 U.S. 657 (1989) ..... 10

*Kalwar v. Liberty Mutual Ins. Co.,*
506 S.E.2d 39 (W. Va. 1998) ..... 7

*Miami Herald Publishing Co. v. Tornillo,*
418 U.S. 241 (1974) ..... 4

*New York Times Co. v. Sullivan,*
376 U.S. 254 (1964) ..... 2

*O'Dell v. Espinoza,*
456 U.S. 430 (1982) ..... 4

*Philadelphia Newspapers, Inc. v. Hepps,*
475 U.S. 767 (1986) ..... 4

*Sprouse v. Clay Communications, Inc.,*
158 W. Va. 427 (1975) ..... 8, 9

*State ex rel. Cooper v. Caperton,*
196 W. Va. 208 (1996) ..... 7

**STATUTES**

28 U.S.C. § 1257(a) ..... 3

# REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

## INTRODUCTION

The Brief in Opposition filed by respondent Charlotte Pritt ("Br. Opp.") fails to address key elements of the Petition for a Writ of Certiorari filed by petitioner Republican National Committee ("RNC") on March 7, 2002.[1]

*First*, Ms. Pritt asserts that there is "no compelling reason" for the Court to grant the RNC's Petition because it is ~~purportedly based on mere~~ "~~speculation that in the future~~, [petitioners] may be denied some constitutional protection." Br. Opp. at 6. Far from the realm of speculation, however, the decision of the Supreme Court of Appeals has *already* had far-reaching impact well beyond the parties to this case. As the RNC has explained (RNC Pet. at 24-27), the decision below institutes a coercive threat of defamation litigation, not terminable by summary judgment even in wholly meritless cases, that inevitably chills free speech and open debate for all political speakers in West Virginia and adjacent states. Ms. Pritt ignores these consequences of the decision below.[2]

---

[1] The RNC does not substantively discuss herein Ms. Pritt's arguments that are directed solely to the separate Petition filed by petitioner National Republican Senatorial Committee ("NRSC") on March 8, 2002. *See generally* Br. Opp. at 16-27. The RNC understands that the NRSC has filed its own Reply Brief to address these issues.

[2] Ms. Pritt also suggests that political committees such as the RNC and the NRSC are not entitled to the same First Amendment protections that are afforded to the press and candidates for office. *See* Br. Opp. at 7-8. This contention is simply wrong. This Court has specifically ruled that political committees "produce speech at the core of the First Amendment," and thus the Court "reject[ed] the notion" that political committees' "form of organization or method of solicitation diminishes their entitlement to First Amendment protection." *Federal* (continued...)

*Second*, Ms. Pritt ignores the glaring deficiency of the decision below, which set out *no facts* bearing on actual malice. Instead, the Supreme Court of Appeals concluded that the mere existence of a disagreement between the parties about the content of the record evinced unidentified "issues of material fact" that rendered the clear and convincing evidence standard *inapplicable*. *See* RNC Pet. App. 15a, 20a n.14. The lower court simply declined to conduct an independent review of the purported evidence of actual malice to determine whether it was (or was not) sufficient to avoid summary judgment. This maneuver contravened the many rulings of this Court that have emphasized two related rules imposed by the First Amendment in public figure defamation cases: (1) to avoid summary judgment, plaintiffs must come forward with clear and convincing evidence that defamatory statements were made with actual malice; and (2) appellate courts must independently review the factual record to determine whether such evidence exists. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 510-11 (1984); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 256 (1986). *See also* RNC Pet. at 12-18.

*Third*, Ms. Pritt ignores the patent conflict between the decision below and rulings from the vast majority of other state high courts and federal circuit courts of appeals. Unlike the Supreme Court of Appeals, the vast majority of lower appellate courts regularly perform full *de novo* review of the evidence adduced in public figure defamation cases and describe the pertinent facts in detail. *Id.* at 19-23. Ms. Pritt neither acknowledges nor addresses this conflict.

---

*Elec. Comm'n v. National Conservative Pol. Action Comm.*, 470 U.S. 480, 493-94 (1985).

*Finally*, as discussed herein, Ms. Pritt also advances several insubstantial affirmative arguments, none of which squarely address the RNC's Petition.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION BELOW.

Ms. Pritt claims that the decision below is neither a final judgment under 28 U.S.C. § 1257(a), nor subject to any of the exceptions to the "final judgment rule" that this Court established in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). *See* Br. Opp. at 2-5. However, Ms. Pritt ignores the very two exceptions on which the RNC relies (RNC Pet. at 2), namely that (1) this is a case in which "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" *and* (2) refusal of immediate review by this Court "might seriously erode federal policy." *Cox*, 420 U.S. at 482-83. Because Ms. Pritt has identified no probative evidence of actual malice by any of the defendants below, a reversal by this Court would result in the reinstatement of summary judgment on Ms. Pritt's claims, thus precluding further litigation. Moreover, a refusal of immediate review by this Court would seriously erode the federal policy of protecting core political speech, an "area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). *See* RNC Pet. at 24-27.

Instead of addressing these plainly applicable exceptions, Ms. Pritt suggests that they were nullified by *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989). *See* Br. Opp. at 3. In that case, the Court discussed and applied two *Cox* exceptions to the "final judgment rule" that the RNC has not invoked, but nowhere did the Court purport to limit or modify *Cox*. *See* 490 U.S. at 611.

Ms. Pritt also cites the Court's per curiam dismissal of certiorari in *O'Dell v. Espinoza*, 456 U.S. 430 (1982), to insinuate that the "final judgment rule" categorically proscribes review of a case that is subject to further proceedings in a lower court. *See* Br. Opp. at 2-3. To the contrary, the Court in *O'Dell* explicitly recognized the "set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in lower state courts." 456 U.S. at 430 (citing *Cox*, 420 U.S. 469). *See also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (granting certiorari and reversing decision of state supreme court that had reversed a verdict and remanded a defamation case for a new trial).

Further, Ms. Pritt attempts to distinguish the cases supporting this Court's jurisdiction (RNC Pet. at 2-3) by noting that they, unlike this case, involved challenges to the constitutionality of state statutes. *See* Br. Opp. at 3-5. This simplistic "distinction" lacks substance. The decisions cited by the RNC were rooted in this Court's fundamental protection of speakers' rights under the First Amendment, regardless of the method of infringement. The mere fact that these cases involved the evaluation of a state statute does not undermine their applicability here.

In *Fort Wayne Books v. Indiana,* 489 U.S. 46 (1989), the Court observed that "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits an exception to the general finality rule." *Id.* at 55. The Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), ruled that "it would be intolerable to leave unanswered" an important First Amendment issue pending a trial because "an uneasy and unsettled constitutional posture" can only harm free speech. *Id.* at 247. Similarly, the Court in *Cox* refused to delay "final decision of the First Amendment claim until after trial." 420 U.S. at 485-86. In none of these cases did

the Court limit its reasoning or conclusions to scenarios involving only challenges to state statutes, and such a limitation cannot properly be inferred.

Finally, as Ms. Pritt herself acknowledges (Br. Opp. at 11), *Anderson v. Liberty Lobby* came to this Court in a procedural posture identical to this case. In *Anderson*, the district court granted summary judgment in favor of a defendant in a public figure defamation action, the D.C. Circuit reversed and remanded the case for trial, and this Court granted certiorari and reversed the D.C. Circuit. *See* 477 U.S. at 246-47, 252. The Court in *Anderson* recognized the fundamental First Amendment purposes served by the independent appellate review of evidence purportedly demonstrating actual malice, and thus exercised jurisdiction despite the pendency of further proceedings in a lower court. For the same reasons, this Court should exercise jurisdiction and grant certiorari to review the decision below.

## II. THE DECISION BELOW CONTRAVENES SETTLED FIRST AMENDMENT LAW.

As the RNC has demonstrated, the Supreme Court of Appeals fundamentally misunderstood or ignored its responsibilities under the First Amendment. *See* RNC Pet. at 8-12, 18-19. The court set out *no facts* bearing on actual malice, and instead concluded that the mere existence of a disagreement between the parties about the content of the record was sufficient to show the existence of "issues of material fact," and thus render the clear and convincing evidence standard *inapplicable*. *See* RNC Pet. App. 15a, 20a n.14.

Ms. Pritt attempts to bolster the decision below by accusing the RNC of making "misleading representations" about the decision. Br. Opp. at 14. In fact, it is Ms. Pritt who now offers faulty rationalizations for the lower court's deficient analysis.

Ms. Pritt asserts that the Supreme Court of Appeals cannot have been "unmindful" of the clear and convincing evidence requirement because the decision below refers to the requirement "no less than ten times." *Id.* at 15. What matters, of course, is not whether the court was "mindful," in the abstract, of its First Amendment responsibilities, but whether it understood and fulfilled them. Here, the court paid lip service to its duty but ultimately brushed it aside, ruling that the clear and convincing evidence standard was "no longer relevant" because the case "cannot be disposed of summarily." RNC Pet. App. 20a n.14. As the RNC has shown (RNC Pet. at 19), this conclusion is precisely *backwards*, because a proper decision that summary judgment was inappropriate could only have been based on a prior finding of clear and convincing evidence of actual malice.[3]

Ms. Pritt also professes amazement at the RNC's contention that the Supreme Court of Appeals "conducted no factual review and failed to apply the proper evidentiary standard" (RNC Pet. at 23), because the court made passing reference to its "review of the record submitted for appellate consideration." Br. Opp. at 16. "How," Ms. Pritt therefore wonders, "can the Petitioner conclude the 'court conducted no factual review?'" *Id.* As the RNC has explained, the text of the decision below reveals no such review. The West Virginia court set out no facts bearing on actual malice, but

---

[3] Ms. Pritt now asserts that the RNC *concocted* the lower court's abandonment of the clear and convincing evidence standard, but she quotes the very language from the decision below that proves the RNC is correct. *See* Br. Opp. at 15-16. Ms. Pritt also states that this language was restricted to the element of falseness in a public figure defamation case (*id.* at 15), but the court's quoted statement expressly pertained to *all* elements of a "prima facie case of defamation," including actual malice. *Id.* (quoting RNC Pet. App. 20a n.14).

instead retreated to the "dispute" between the parties about whether such evidence existed. *See* RNC Pet. App. 15a, 20a n.14. One would suppose that every public figure defamation plaintiff will *claim* the record contains evidence of actual malice, but the West Virginia court committed a serious legal error by assuming that Ms. Pritt's claim was sufficient to comply with this Court's rulings in *Bose*, *Anderson*, and their progeny.[4]

Indeed, Ms. Pritt cannot, even at this late date, identify any probative "evidence" of actual malice. Her effort to muster evidence of actual malice -- the central issue in this case -- comprises but one paragraph on the penultimate page of her brief. *See* Br. Opp. at 29-30.

*First*, Ms. Pritt criticizes David Welch for focusing only on those portions of her legislative record that he considered relevant to the central message of the advertisements at issue. *Id.* at 29. Putting to the side the practical considerations of trying to discuss Ms. Pritt's *entire* legislative record in a 30 (or 60) second spot, Mr. Welch's decision to focus on particular votes in no way undermines his testimony that the advertisements were "absolutely true." Welch Depo. Tr. at 88. *Second*, Ms. Pritt highlights the NRSC's decision to continue airing the independent expenditures despite objections from Ms. Pritt's Republican opponent (Br. Opp. at 29), but this too is immaterial to actual

---

[4] In an unavailing attempt to defend the decision below, Ms. Pritt criticizes the trial court for its entry of a summary judgment order that was drafted by counsel for defendants (Br. Opp. at 18), but this practice has been approved by the Supreme Court of Appeals. *See Kalwar v. Liberty Mutual Ins. Co.*, 506 S.E.2d 39, 44 (W. Va. 1998); *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214 (1996). Further, taken at face value, Ms. Pritt's criticism of the trial court would *highlight* the need for independent appellate review of the evidence bearing on actual malice.

malice because (as her opponent's letter on this point stated and as he testified) the objection was merely to the "tone" of the advertisements and in no way suggested that any of the statements at issue were false, let alone knowingly so. *See* Underwood Depo. Tr. at 10-11, 20. *Finally*, Ms. Pritt asserts a "pattern of deception surrounding the broadcasting of the ads" (Br. Opp. at 29), presumably referring to certain claimed inaccuracies in Mr. Welch's account of how the spots were funded. *Id.* at 12-13.[5] Even if true, Ms. Pritt's assertions have nothing to do with "actual malice," namely whether Mr. Welch knew the statements in the spots were false or recklessly disregarded their falseness.

Even these allegations, insufficient as they are, exceed the West Virginia court's analysis of the actual malice issue. The lower court's decision presents an important issue that, we respectfully submit, well merits consideration by this Court.

## III. THE *SPROUSE* CASE CONFIRMS MS. PRITT'S FAILURE TO ADDUCE EVIDENCE OF ACTUAL MALICE.

Finally, Ms. Pritt takes note of the West Virginia court's decision in *Sprouse v. Clay Communications, Inc.*, 158 W. Va. 427 (1975), because, in her view, it "is unconscionable to omit discussion of it in a brief concerning this case." Br. Opp. at 28. Of course, the lower court's decision in *Sprouse* is not binding on this Court. More importantly, the decision supports the RNC's Petition.

---

[5] The West Virginia State Victory Committee was formed not for nefarious purposes, but to comply with West Virginia state law, which required formation of a separate political committee for the airing and reporting of independent expenditures.

In *Sprouse*, the Supreme Court of Appeals affirmed in part and reversed in part a jury verdict finding that a newspaper had willfully entered a scheme with plaintiff's gubernatorial opponent to publish false headlines about plaintiff, in knowing disregard of journalistic standards. *See* 158 W. Va. at 429. Here, in contrast, there is simply *no* probative evidence that the statements at issue were false, much less that the NRSC (or the RNC) acted with actual malice. *See* NRSC Pet. at 20-27; *see also* RNC Pet. at 6 n.3. The decision below is conspicuously devoid of any such evidence.[6]

Notably, the *Sprouse* decision recognized that:

> *[A] political campaign necessarily involves intent on the part of one political group to "injure" opposition candidates by depriving them of elective office.* In libel law, "malice" has a much narrower definition and requires not only a deliberate intent to injure, but also an intent to injure through the publication of false or misleading defamatory statements *known by the publisher or its agents to be false*, or an intent to injure through publication of such defamatory statements with *reckless and willful disregard for their truth.*

158 W. Va. at 433 (emphasis added).

Accordingly, even the *Sprouse* decision demonstrates that Ms. Pritt cannot sustain her burden of proving actual malice by mere reference to the fact that the advertisements at issue were unflattering and part of a concerted political

---

[6] Further, although the RNC contends, and the trial court found, that the statements at issue were *true* (RNC Pet. at 6 n.3), this question is separate and apart from whether the RNC or the NRSC acted with actual malice.

effort to defeat her candidacy for Governor of West Virginia. *See also Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 665-66 (1989) (speaker's intent to promote one candidate for elected office over another does not establish actual malice). Read broadly, however, this is the maximum extent of Ms. Pritt's "evidence" of actual malice.

## CONCLUSION

For the reasons stated herein, petitioner Republican National Committee respectfully urges this Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,

Bobby R. Burchfield
*Counsel of Record*
Jason A. Levine
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

*Attorneys for Petitioner*

Thomas J. Josefiak
*Chief Counsel*
Charles R. Spies
*Deputy Counsel*
REPUBLICAN NATIONAL COMMITTEE
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8638

*Of Counsel*

July 26, 2002